CF0000063556

(02)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR, MP.

Criminal Appeal No.1309 /2000.

APPELLANT.
(IN JAIL). : Birendra Masih S/o. George Masih, age 33 years, Occupation- Service,(SECL) R/o. Bishrampur PS- Bishrampur Distt-Sarguja, MP.

-Versus-

RESPONDENT. : The State of M.P. through PS- Jainagar District- Sarguja, MP.

CRIMINAL APPEAL U/S. 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

CONVICTION	SENTENCE
1.U/s.147 IPC	1 year RI
2.U/s.302/149 IPC	Life Imprisonment and fine of Rs. 1,000/-. In default of payment 5 months RI more.

Sentences to run concurrently and sentence already undergone to be adjusted.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.1585/2000

Suresh Pandey

Vs.

State of Madhya Pradesh (now Chhattisgarh)

Cr.Appeal No. 1309/2000

Birendra Masih

Vs.

State of Madhya Pradesh (now Chhattisgarh)

Cr.Appeal No. 1326/2000

Rajesh & another

Vs.

State of Madhya Pradesh (now Chhattisgarh)

Cr. Appeal No. 1402/2000

Sirajuddin

Vs.

State of Madhya Pradesh (now Chhattisgarh)

CORAM: - HON'BLE SHRI FAKHRUDDIN,
& HON'BLE SHRI DILIP RAOSAHEB DESHMUKH, J.J.

PRESENT: -

Shri Surendra Singh, learned Senior Advocate with Shri Neeraj Mehta, learned counsel for the accused-appellant.

Shri U.N.S.Deo, Govt. Advocate/Additional Public Prosecutor with Shri M.P.S.Bhatia, Panel Lawyer for the State.

J U D G M E N T

(Delivered on 21 -11-2005)

Per Dilip Raosaheb Deshmukh, J.

1. This Judgment shall dispose Cr. Appeal No.1585/2000 filed by the appellant Suresh Pandey,

Cr. Appeal No.1309/2000 filed by the appellant Birendra Masih, Cr. Appeal No. 1326/2000 filed by the appellants Rajesh & others and Cr. Appeal No. 1402/2000 filed by the appellant Sirajuddin.

2. The abovementioned appellants being aggrieved by the judgment dated 08-05-2000 delivered in Sessions Case No. 470/1993 by Shri C.L.S.Tekam, Additional Sessions Judge, Surajpur whereby the appellant Chhotu alias Krishna was convicted under Section-147 & 302 of the I.P.C. and sentenced to rigorous imprisonment for 1 year under Section-147 of the I.P.C. and to imprisonment for life & fine of Rs.1,000/- under Section-302 of the I.P.C. and in default to undergo additional rigorous imprisonment for 5 months. The appellants Rajesh, Suresh, Birendra Masih and Sirajuddin were also convicted under Section-147 of the I.P.C. and Section-302 read with Section-149 of the I.P.C. and were sentenced to rigorous imprisonment for 1 year under Section-147 of the I.P.C. and to life imprisonment and fine of Rs. 1,000/ each under Section-302 read with Section-149 of the I.P.C. and in default of payment of fine to undergo additional rigorous imprisonment for 5 months.

3. Briefly stated the prosecution story is that the deceased Lalchand owned the house and *badi* in Village-Mahadev para, Keshav Nagar, Vishrampur, District-Sarguja which had a fencing tied on wooden poles. On 18-03-1992 at about 11 P.M., the appellants were uprooting the wooden poles from the *badi* of Lalchand for burning in the Holi fire. The appellant Chhotu had an iron rod, the appellant Suresh was carrying a knife and the remaining appellants were carrying lathies.

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Sabinath Ram PW-1 younger brother of Lalchand prevented the appellants from uprooting the wooden poles. The appellant Chhotu @ Krishna caught hold of the neck of Sabinath Ram PW-1 who shouted. Hearing the shouts Bajari Bai PW-3 along with her husband Lalchand came to the place of occurrence. When Lalchand attempted to liberate Sabinath Ram PW-1, the appellant Birendra Masih and Rajesh caught hold of Lalchand. Birendra pushed Bajari Bai PW-3 who fell down. On this, the appellant Chhotu @ Krishna assaulted Lalchand from behind on the head by an iron angle rod. All the appellants ran away thereafter.

4. Sabinath PW-1 and Bajari Bai PW-3 brought Lalchand home. Kameel Beck PW-2 who saw the occurrence informed the police which arrived at the place of occurrence. Dehati Nalishi Ex.P-1 was lodged by Sabinath Ram PW-1. An offence under Section-147, 149 and 307 of the I.P.C. was registered at Police Station-Jay Nagar, vide Ex.P-1(A). Sabinath Ram PW-1 got Lalchand admitted in the Regional Hospital, Vishrampur. Dr. D.K.Patra who examined Lalchand found an incised wound over scalp size 3 ½" x ½". There was no bleeding from the nose and ears. Lalchand was vomitting. Lalchand succumbed to the injury in early hours of 19-03-1992. Sub Inspector Dhruv Das Vaishnav PW-9 prepared inquest vide Ex.P-8 and sent the dead body of Lalchand for postmortem examination. Dr. Kamlesh Kumar Tamrakar PW-7 conducted the postmortem examination on Lalchand found an abrasion over right ear lobules size 1 ½ x ½ cm reddish in colour and one contusion over right tempero parietal region with stitched injury transversely placed size 17 x 10 x 5 cm. On removing stitches he found that the injury which was a lacerated

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wound was scalp deep. There was a linear fracture of right tempero parietal bone transversely placed 10 cm in length. Anterior to this fracture another linear fracture of similar bone was present, size 4 cm in length. Extra dural haematoma was present underlying the injury. Dr. Tamrakar opined that the abovementioned fracture was caused by hard and blunt object and was dangerous to life. In his opinion cause of death was coma due to head injury. On 21-03-1992, one iron rod size 17 ½ "in length and 4 Inches in circumference was seized from the appellant Chhotu @ Krishna vide Ex.P-5. Spot map was prepared by Patwari Mohd. Israel PW-8 vide Ex.P-14 which showed that the place of occurrence was the badi of Kameel Beck PW-2. After completion of investigation, the appellants were prosecuted for offence under Section-147, 302 and also under Section-302 read with Section-149 of the I.P.C.

5. The appellants abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 11 witnesses. The trial Judge relying upon the evidence led by the prosecution convicted and sentenced the appellants as shown above in para-1.

6. Shri Surendra Singh learned senior counsel for the appellants has argued that the evidence led by the prosecution fails to establish the charge under Section-147 and Section-302 read with Section-149 of the I.P.C. against the appellants Suresh, Birendra, Rajesh and Sirajuddin since there was no evidence on record to establish common intention to cause the death of Lalchand for these appellants who had no motive therefor. The evidence of Sabinath Ram PW-1 that

Lalchand was held by Birendra and Rajesh was nothing but improvement in the prosecution case and could not be relied on since it did not find place in the F.I.R. Ex.P-1 lodged by Sabinath Ram PW-1. It was next contended that Kameel Beck PW-2 did not see any iron angle rod in the hand of appellant Chhotu @ Krishna. Phalianus Minj PW-5, an eye witness did not depose that the appellant Chhotu @ Krishna had assaulted Lalchand by a rod. Amrit PW-6 did not support the prosecution story and was declared hostile. It was argued that the testimony of Phalianus Minj PW-5 showed that there was a scuffle which revealed that the incident had occurred upon a sudden fight. So far as the assault made by the appellant Chhotu @ Krishna by an Iron angle rod on Lalchand was concerned it was contended that the appellant Chhotu was alleged to have caused only a single injury on the head of Lalchand. Reliance was placed in the case of ***State of Orissa Vs. Bhagban Barik*** reported in **A.I.R.-1987-SC-1265**, in the case of ***Tnagaiya Vs. State of Tamil Nadu*** reported in **A.I.R.-2005-SC-1142,** in the case of ***Bagdiram Vs. State of M.P.*** reported in **J.L.J.-2005 Volume-I-263** and it was argued that the offence if any committed by the appellant Chhotu @ Krishna did not travel beyond Section-304 Part-II of the I.P.C. It was also contended that conviction of the appellants Suresh, Birendra, Rajesh and Sirajuddin under Section-302 read with Section-149 of the I.P.C. and also under Section-147 of the I.P.C. was could not be sustained. Reliance was placed in the case of ***Dharam Pal & others Vs. State of Haryana*** reported in **A.I.R.-1978-SC-1492**, ***Puran Vs. State of Rajsthan*** reported in **A.I.R.-1976-SC-912,** ***Kanwarlal & others Vs. State of Madhya Pradesh*** reported in **Cr.L.J.-2003-62,** ***Rambilas Singh and***

others Vs. State of Bihar reported in **A.I.R.-1989-SC-1593 and *Shaikh Nabab Shaikh Babu Musalman and others Vs. State of Maharashtra*** reported in **A.I.R.-1993-SC-169.** On the other hand, Shri U.N.S.Deo, learned Govt. Advocate placed reliance in the case of ***Umesh Singh & another Vs. State of Bihar*** reported in **SCC-2000 (6)-89, *Rameshwar Dayal & others Vs. State of Madhya Pradesh*** reported in **A.I.R.-2002-SC-754 and *Sheo Mahadeo Singh Vs. State of Bihar*** reported in **1970-SCC(3)-46** and contended that in the facts and circumstances of the case since the appellants had gone to the place of occurrence to settle the score that the deceased upon a previous enmity it was not necessary for the prosecution to prove specific overt acts on part of all the members of unlawful assembly. Reliance was also placed ***Munshi Prasad Vs. State of Bihar*** reported in **SCC (Criminal)-2002-178 and *Ravi Kumar Vs. State of Punjab*** reported in **Criminal Law Journal-SC-2005-1742** while arguing in support of the judgment of the trial Court. Learned counsel for the appellant also placed reliance in the case of ***K. Ramakrishnan Unnithan Vs. State of Kerala***reported in **A.I.R.-1999-SC-1428,*Mavila Thamban Nambiar Vs. State of Kerala*** reported in **A.I.R.-1997-SC-687,*Shitla Prasad @ Baba Vs. State of Uttar Pradesh*** reported in **A.I.R.-1994-SC-1643 and Guljar Hussain Vs. State of U.P.** reported in **A.I.R.-1992-SC-2027** while arguing that the offence if any committed by the appellant Chhotu @ Krishna did not travel beyond Section-304 Part-II of the I.P.C.

7. We have heard rival contentions and have also perused the record. Sabinath Ram PW-1 is the person who had

first reached the place of occurrence and saw that the appellants were uprooting the wooden poles from their *badi*. His testimony that the appellant Chhotu @ Krishna caught hold of his neck whereupon trying to liberate himself he shouted, fails to inspire confidence since this does not find place in the F.I.R. Ex.P-1 lodged by him. It also does not find place in his statement recorded under Section-161 of the Cr.P.C. Ex.D-1. No such statement was made by Kameel Beck PW-2, Phalianus Minj PW-5 and Amrit PW-6 who were examined by the prosecution as eye-witnesses. Bajari Bai PW-3, wife of Lalchand has stated that the appellant Chhotu had pressed the throat of Sabinath Ram PW-1 but has admitted in cross-examination that in her statement recorded under Section-161 of the Cr.P.C., she did not state the abovementioned fact. No injury whatsoever was found on Sabinath Ram PW-1.

8. So far as the testimony of Sabinath Ram PW-1 that Birendra pushed Bajari Bai PW-3 is concerned, it does not find corroboration from Bajari Bai PW-3. No injury whatsoever was found on Bajari Bai. Phalianus Minj PW-5 has stated that on reaching the place of occurrence he saw that a scuffle was going on but did not specifically attribute any overt act to any appellant. Amrit PW-6 has also not supported the prosecution version and was declared hostile. In view of the omission in the F.I.R. lodged by Sabinath PW-1 and also in the statement of Sabinath Ram PW-1 and Bajari Bai PW-3 recorded under Section-161 of the Cr.P.C., the overt acts attributed to the appellants Suresh, Birendra, Rajesh and Sirajuddin for the first time in evidence before the trial Court are nothing but improvement in the prosecution story and cannot be relied on. If the appellants Suresh, Birendra, Rajesh

and Sirajuddin had assaulted Lalchand, Sabinath Ram PW-1 and Bajari Bai PW-3 by fists or kicks, at least some such injuries would have been found on their person. Omissions in the F.I.R. lodged by Sabinath Ram PW-1 and the statements recorded under Section-161 of the Cr.P.C. of Sabinath Ram PW-1, Ex.D-1, Bajari Bai PW-3, Ex.D-3 clearly renders their testimony that the appellants Suresh, Birendra, Rajesh and Sirajuddin had committed any overt act during the assault made by the appellant Chhotu @ Krishna on Lalchand by an iron angle rod, unworthy of credit.

9. Dr. D.K. Patra who had examined Lalchand on 19-03-1992 had found only a single incised wound over scalp of Lalchand was not examined by the prosecution. The injury report of Dr. D.K. Patra was proved by Dr. Ramesh Patnaik PW-8. The injury report Ex.P-15 shows that besides an incised wound over scalp size 3 ½" x ½", there was no other injury on the person of Lalchand. It also shows that there was no bleeding from nose and ears. Dr. Kamlesh Kumar Tamrakar PW-7 who conducted the postmortem on Lalchand found that the injury sustained by Lalchand was a lacerated wound and not an incised wound on the right tempero parietal region. No bleeding was present from the wound which reflects the mild force with which the injury was caused.

10. Having considered the evidence led by the prosecution in its entirety and also the rival contentions, we are of the considered opinion that the evidence of Sabinath Ram PW-1, Bajari Bai PW-3, Dr. Ramesh Patnaik PW-8 and Dr. Kamlesh Kumar Tamrakar PW-7 only established that the appellant Chhotu @ Krishna had dealt a single blow by an iron angle rod on the skull of

Lalchand. No other injury on Lalchand was caused either by Chhotu or by the other appellants Suresh, Birendra, Rajesh and Sirajuddin. The testimony of Sabinath Ram PW-1 and Bajari Bai PW-3 attributing overt acts to these co-appellants fails to inspire confidence and is wholly unworthy of credit in view of the omissions in the F.I.R. as also in their statement recorded under Section-161 of the Cr.P.C. The testimony of Patwari Mohd. Israel PW-8 does not show that any wooden poles had actually been removed from the *badi* of Kameel Beck PW-2 by the appellants. Kameel Beck PW-2 has also not stated that any poles had been uprooted from his *badi*. No uprooted wooden poles were seized during investigation. The testimony of Sabinath Ram PW-1 also does not show that the appellants had actually uprooted any wooden poles from the *badi*. Since, the root cause for the occurrence is itself shrouded in mystery, we are of the considered opinion that the evidence led by the prosecution fails to establish the complicity of the appellants Suresh, Birendra, Rajesh and Sirajuddin in the assault by Chhotu @ Krishna on Lalchand. The evidence led by the prosecution does not prove that the appellants Suresh, Birendra, Rajesh and Sirajuddin had formed an unlawful assembly with Chhotu and shared common intention with Chhotu in the assault on Lalchand. There is absolutely nothing on record to substantiate the motive of the appellants to cause the death of Lalchand. Considering the fact that after the single blow by an iron angle rod dealt by the appellant Chhotu on Lalchand, no other injury was caused on Lalchand either by the Chhotu or by any of the appellants, we are of the considered opinion that the prosecution has failed to prove that the appellants had formed an unlawful assembly with the object of causing

the death of Lalchand and in furtherance of this common object of the assembly, the appellants Suresh, Birendra, Rajesh and Sirajuddin had done any overt act to accomplish the common object of the assembly. We are, therefore, of the considered opinion that the offence under Section-147 and Section-302 read with Section-149 of the I.P.C. has not been established by the prosecution against the appellants Suresh, Birendra, Rajesh and Sirajuddin.

11. So far as the appellant Chhotu @ Krishna is concerned all that emerges from the evidence of Sabinath Ram PW-1 & Bajari Bai PW-3 is that he had inflicted a single blow by an iron angle rod on the Lalchand without much force. The medical evidence does not show that there was bleeding from the wound. The report of Dr. D.K.Patra Ex.P-15 shows that Lalchand had no bleeding from the ears and nose. While Dr. Patra has mentioned that the injury was an incised wound, Dr. Ramesh Patnaik PW-8 has in his report vide Ex.P-11 mentioned that it was a lacerated wound. It appears that the blow was not dealt with sufficient force on the head of Lalchand by the appellant Chhotu @ Krishna. The fact that no further injury was caused by the appellant Chhotu also supports the view that the intention to cause death of Lalchand was lacking. In the case of ***Thangaiya Vs. State of Tamil Nadu*** reported in **A.I.R.-2005-SC-1142,** the Apex Court has laid down the criterion for the applicability of Section-300 of I.P.C. The weapon used, size of weapon, place of assault, facts leading to assault, part of body where injury is inflicted are relevant factors to be considered. Where the fatal blow was given to the deceased with a small stick in a dimly lit place, it was

held that the case was covered by Section-304 Part-I of the I.P.C. and conviction was altered from Section-302 to Section-304 Part-I of the I.P.C. Applying the principles laid down by the Apex Court to the facts of the present case, we find that the occurrence took place at about 11 P.M. As it appears from the evidence of Phalianus Minj PW-5 the possibility that there was a scuffle between Sabinath Ram PW-1 & Lalchand and the appellants could not be ruled out. It appears that during this period, the appellant Chhotu @ Krishna struck with an iron rod on the head of Lalchand only once. No other injury was caused. Considering the time of occurrence, the size of the weapon and the force with which it was used, the fact that only a single blow was given, we are of the considered opinion that the offence committed by the appellant Chhotu does not travel beyond Section-304 Part-II of the I.P.C. as intention for causing the death of Lalchand cannot be attributed to the appellant Chhotu @ Krishna. In the facts and circumstances of the case at the most it can be said that by assaulting Lalchand on the head by an iron angle rod, the appellant Chhotu had the knowledge that the injury being caused on the vital part was likely to cause death. Therefore, the offence committed by the appellant Chhotu does not travel beyond Section-304 Part-II of the I.P.C.

12. In the result, Cr.Appeal No.1585/2000 filed by the appellant Suresh Pandey, Cr. Appeal No.1309/2000 filed by the appellant Birendra Masih, Cr. Appeal No. 1326/2000 filed by the appellant Rajesh and Cr. Appeal No. 1402/2000 filed by the appellant Sirajuddin are allowed. The conviction of the appellants Suresh, Birendra, Rajesh and Sirajuddin under Section-147 & Section-302 read with Section-149 of

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the I.P.C. and the sentences imposed thereunder are set aside. These abovementioned appellants are acquitted of the charges under Section-147 and Section-302 read with Section-149 of the I.P.C. So far as the Cr. Appeal No.1326/2000 filed by the appellant Chhotu @ Krishna is concerned, it is partly allowed. The conviction of the appellant Chhotu @ Krishna under Section-147 and Section-302 of the I.P.C. and the sentences imposed thereunder are set aside. The appellant Chhotu alias Krishna is convicted under Section-304 Part-II of the I.P.C. and sentenced to rigorous imprisonment for 10 years. The appellant Chhotu is in jail from 21-03-1992 to 02-05-1992 and thereafter from 08-05-2000 to till date. Set off under Section-428 of the Cr.P.C. for the period already undergone by the appellant in detention be given to the appellant Chhotu @ Krishna.

Sd/-
Fakhruddin
Judge
21-11-2005

Sd/-
D.R.Deshmukh
Judge
21-11-2005

Satish